Docket #0042 Date Filed: 7/13/2020

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE**

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| In re:<br><br>WELDED CONSTRUCTION, L.P., et al.,<br><br>Debtors. | Chapter 11<br><br>Case No. 18-12378 (CSS)<br><br>(Jointly Administered) |
| EARTH PIPELINE SERVICES, INC.,<br><br>Plaintiff,<br>v.<br><br>COLUMBIA GAS TRANSMISSION, LLC, WELDED CONSTRUCTION, L.P.,<br><br>Defendants. | Adv. Pro. No. 19-50274 (CSS)<br>Adv. Pro. No. 19-50275 (CSS)<br><br>(Consolidated) |
| WELDED CONSTRUCTION, L.P.,<br><br>Plaintiff,<br>v.<br><br>EARTH PIPELINE SERVICES, INC.<br><br>Defendants. | Adv. Proc. No. 20-50612 (CSS)<br><br>(Consolidated) |

**Columbia Gas Transmission, LLC's**
**Reply in Support of its Motion to Dismiss**

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## TABLE OF CONTENTS

**Page**

TABLE OF AUTHORITIES ..... ii

I. EPS Waived its Right to Maintain or Enforce its Lien Claims.....2

A. The Court can Decide CGT's Lien Waiver Defense on a 12(b)(6) Motion.2

B. The No-Lien Clause is Unambiguous.....3

C. The Subcontractors Liability and Indemnity Clause does not Affect the No-Lien Clause. .....8

D. Welded's Right to Withhold Payment Under the No-Lien Clause renders EPS's Purported Liens Unenforceable.....9

E. The Public Policy of West Virginia Supports Blanket Lien Waivers.....10

II. EPS's Quasi-Contractual Claims must be Dismissed because they are not Supported by Independent Facts. .....11

III. The Court should not Grant EPS Leave to Amend. .....15

CONCLUSION.....15

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*U.S. ex rel. Asphalt Contractors & Site Work, Inc. v. KAR Contracting, LLC*,
No. 14-27451, 2015 WL 3651279 (S.D.W. Va. June 11, 2015).....13, 14

*Brownmark Films, LLC v. Comedy Partners*,
682 F.3d 687 (7th Cir. 2012) .....2

*Calvitti v. Anthony & Sylvan Pools Corp.*,
No. 2:07-CV-3196-LDD, 2008 WL 11451228 (E.D. Pa. June 3, 2008),
*aff'd*, 351 Fed. Appx. 651 (3d Cir. 2009) .....2, 3, 5

*Cardinal Cost. Co. v. Besmic, Inc.*,
701 F. Supp. 1274 (S.D.W. Va. 1988).....7

*Fuller Co v. Brown Minneapolis Tank and Fabricating Co.*,
678 F. Supp. 506 (E.D. Pa. 1987) .....6, 7

*Gasoline Sales, Inc. v. Aero Oil Co.*,
39 F.3d 70 (3d Cir. 1994).....15

*Haskins v. Point Towing Co.*,
421 F.2d 532 (3d Cir. 1970).....3

*HERC Servs., LLC v. Columbia Gas Transmission, LLC*,
No. 5:19CV000174, Order Dismissing Compl. (N.D.W. Va. June 24, 2019) .....12

*Kane & Keyser Hardware Co. v. Cobb*,
79 W. Va. 587 (1917) .....10

*Kost v Kozakiewicz*,
1 F.3d 176 (3d Cir. 1993).....3

*U.S. ex rel. Master Masonry, LLC v. Travelers Casualty and Surety Co.*,
No. 16-50, 2016 WL 7156587 (N.D.W. Va. 2016) .....13, 14

*Ohio Valley Health Servs. & Educ. Corp. v. Riley*,
149 F. Supp. 3d 709 (N.D.W. Va. 2015) ..... *passim*

*U.S. ex rel. Schumann v. AstraZeneca Pharm. L.P.*,
769 F.3d 837 (3d Cir. 2014).....15

*Schmid Pipeline Constr. Inc. v. Columbia Gas Transmission, LLC*,
Adv. Pro No. 19-50886-CSS, Mem. Order (Bankr. D. Del. Dec. 20, 2019) ..... *passim*

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

*Span Constr. & Eng'g, Inc. v. Uwharrie Builders, LLC*,
No. 18-178, 2019 WL 1574233 (N.D.W. Va. Jan. 30, 2019) ..... 14

*Stand Energy Corp. v. Columbia Gas Transmission Corp.*,
373 F. Supp. 2d 631, 644 (S.D.W. Va. 2005), on reconsideration in part,
521 F. Supp. 2d 537 (S.D.W. Va. 2007), and on reconsideration in part,
CV 2:04-0867, 2008 WL 11430036 (S.D.W. Va. Jan. 4, 2008). ..... 13

*SWN Prod. Co., LLC v. Long*,
240 W. Va. 1, 807 S.E.2d 249 (W. Va. 2017) ..... 3

*Vorcheimer v. Philadelphian Owners Ass'n*,
903 F.3d 100 (3d Cir. 2018) ..... 3

*Wellington Power Corp. v. CNA Sur. Corp.*,
217 W. Va. 33 (W. Va. 2005) ..... 11

*Worldwide Mach. L.P. v. Columbia Gas Transmission, LLC*,
No. 5:19-CV-208, 2019 WL 3558174 (N.D.W. Va. Aug. 5, 2019) ..... *passim*

*Pennsylvania ex rel Zimmerman v. PepsiCo, Inc.*,
836 F.2d 173 (3d Cir. 1988) ..... 3

**Statutes, Rules and Regulations**

W. Va. Code § 38-2-2 ..... 10

W. Va. Code § 38-2-22 ..... 7

FED. R. CIV. P. 12(b)(6) ..... 2, 3

**Other Authorities**

INDEMNITY, Black's Law Dictionary (11th ed. 2019) ..... 8

In its see-what-sticks Response (Dkt. No. 36), EPS levels a broad array of arguments in an attempt to escape the consequences of its Subcontract. EPS's verbosity should not be confused for substance; when the time comes for EPS to explain the Subcontract's lien release and discharge covenants, EPS's Response is resoundingly silent.

Rather than addressing this key legal obstacle, EPS fixates on the fact that the No-Lien Clause does not state the word "waiver." The presence or absence of this language is irrelevant. Since EPS is obligated to release and discharge any lien it files (and is due no money until it complies with this obligation), the only reasonable application of the No-Lien Clause is as a waiver of EPS's rights to enforce liens against CGT's property interests. There is no ambiguity in the clause's language, and EPS has not offered any competing interpretation of its release and discharge obligations. Short on contractual support for its position, EPS then argues that the No-Lien Clause is unenforceable as a matter of public policy. But EPS cites no West Virginia authority in support of this proposition, and it cannot. Because West Virginia public policy strongly supports freedom of contract, public policy arguments support CGT, not EPS.

EPS's arguments for its quasi-contractual claims are similarly misguided. EPS confuses the parties' dispute over whether certain amounts are due to EPS under the Subcontract with a dispute over whether EPS performed its work on MXP pursuant to a contract. This is a fantasy. CGT does not contest that EPS's work was performed pursuant a contract, and has affirmatively pleaded the opposite. *See* Dkt. No. 10, CGT's First Am. Answer and Countercl. at Countercl. ¶4. Because the parties do not dispute that EPS's work was performed under a contract, there can be no independent factual basis to support EPS's quasi-contractual causes of action.

Having contractually waived its rights to enforce its liens, and without an independent factual basis to pursue quasi-contractual claims, EPS is not entitled to proceed. Given that EPS is

on its third version of its complaint, and this case has been pending since March 2019, dismissal should be with prejudice.

## I. EPS Waived its Right to Maintain or Enforce its Lien Claims.

EPS appears to make five scattershot arguments against lien waiver, summarized as follows: (1) CGT's lien waiver argument is procedurally improper; (2) the No-Lien Clause is ambiguous and cannot be the basis of a 12(b)(6) dismissal; (3) the Subcontract's Liability and Indemnity Clause implies that EPS did not waive its lien rights; (4) Welded's defenses to payments do not provide a defense to CGT; and (5) public policy prevents the Court from applying the No-Lien Clause as a blanket lien waiver. EPS blurs these points, seemingly unable to finish one argument before starting another and intermingling them in a way that is presumably intended to mask their lack of substance. Each of EPS's arguments is without merit, and is rebutted in turn.

### A. The Court can Decide CGT's Lien Waiver Defense on a 12(b)(6) Motion.

EPS challenges the Court's ability to dismiss its claim on the basis of contractual waiver, but exclusively relies on authority from the Seventh Circuit.[1] Response at 8. In the Third Circuit, however, a motion to dismiss can be based on a contractual waiver defense "if the claims under which the plaintiff seeks relief are barred by the unambiguous terms of a contract attached to the pleading, because the interpretation of an unambiguous contract is a matter of law for the court." *Calvitti v. Anthony & Sylvan Pools Corp.*, No. 2:07-CV-3196-LDD, 2008 WL 11451228, at *2 (E.D. Pa. June 3, 2008), *aff'd*, 351 Fed. Appx. 651 (3d Cir. 2009) (affirming district court's 12(b)(6) dismissal on the basis of a contractual waiver).

Additionally, while EPS admits that the Court may "consider the facts included in the

[1] EPS incorrectly cites *Brownmark*, which held that a district court could properly consider a contractual affirmative defense in a motion to dismiss if it converts that motion to dismiss into a motion for summary judgment. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 692 (7th Cir. 2012).

exhibits to a complaint in its analysis of a motion to dismiss for failure to state a claim," it insists that the Court must accept its conclusory allegations regarding the Subcontract over the Court's legal interpretation of the Subcontract. Response at 7-8. This cannot be. Tellingly, EPS has not tried to rebut *Vorcheimer*, cited in CGT's Motion for the proposition that if the plaintiff's "exhibits contradict [its] own allegations in the complaint, the exhibits control." *Vorcheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 112 (3d Cir. 2018).

The principle announced in *Vorcheimer* is apt because the Court "need not credit a complaint's 'bald assertions' or legal conclusions.'" *Kost v Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993) (internal quotations omitted). "Therefore, a claim may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought." *Calvitti v. Anthony & Sylvan Pools Corp*., No. 2:07-CV-3196-LDD, 2008 WL 11451228, at *2 (E.D. Pa. June 3, 2008), *aff'd*, 351 Fed. Appx. 651 (3d Cir. 2009); *see also Pennsylvania ex rel Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 179-80 (3d Cir. 1988). Indeed, the "construction of a contract is a question of law for the court to decide . . . and when clear and unambiguous language is at issue, it is reversible error to leave such questions for the jury." *Haskins v. Point Towing Co.*, 421 F.2d 532, 536 (3d Cir. 1970) (internal citations omitted).

In sum, this Court may properly consider, interpret, and apply the Subcontract's No-Lien Clause when it rules on CGT's 12(b)(6) motion.

**B. <u>The No-Lien Clause is Unambiguous.</u>**

EPS argues that the Subcontract is ambiguous, and does not clearly and expressly waive EPS's lien rights. Under West Virginia law, "[c]ontract language is considered ambiguous where an agreement's terms are inconsistent on their face or where phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." *SWN Prod. Co., LLC v. Long*, 240 W. Va. 1, 7, 807 S.E.2d 249, 255 (W. Va. 2017) (citations omitted).

"The term 'ambiguity' is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." *Id.* (citations omitted). "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." *Id.*

EPS's ambiguity argument fails because EPS merely disagrees with the construction of the No-Lien Clause. EPS has not offered a single example of inconsistent terms, or language that can support reasonable differences of interpretation. It cannot: reasonable minds cannot disagree on the construction of the No-Lien Clause. EPS must "cause any Lien which may be filed or recorded against the Work, the Facility, the Work Site or any lands or property of [CGT] to be released and discharged forthwith at the cost and expense of [EPS]." Dkt. 23-1, Subcontract at p. 15. EPS's failure to offer an alternative interpretation of this discharge and release obligation is compelling evidence that there is no ambiguity in the No-Lien Clause. Indeed, EPS even accepts that the clause sets forth "the responsibilities of either EPS or Welded to release or discharge the mechanics' lien after it is filed." Response at 9. This admission is fatal to EPS.

Instead of identifying any ambiguity in the Subcontract, EPS offers an incorrect construction of the No-Lien Clause. EPS argues that because the No-Lien Clause does not contain the word "waive" or "waiver," and does not literally say that EPS cannot *file* a lien, the No-Lien Clause cannot act as a lien waiver. Response at 9. But the absence of this language is irrelevant. Even EPS accepts that the existence of a contractual waiver is determined by the "reasonable application of the language of the contract." *Id.* at 10 (citations omitted). And the reasonable application of the above-quoted Subcontract language is to require EPS to release and discharge its liens. The absence of the word "waive" does not create any confusion about EPS's obligation

to release and discharge the liens, and EPS has not offered a competing construction.

EPS also argues that because the clause "uses phrases like 'discharge', 'filed and recorded', [and] 'still registered' when talking about a mechanics' lien," the clause "implies that EPS did not waive its statutory right to a mechanics' lien claim." Response at 12, 15. EPS appears to be arguing that because the clause obligates EPS to perform certain actions after the filing of a lien, the clause cannot prevent EPS from "filing and enforcing a mechanics' lien." *Id.* at 12. This too is irrelevant. Notably, CGT has never argued that the No-Lien Clause waives EPS's rights to literally *file* a lien. Instead, CGT has only argued that "EPS has no viable mechanic's lien claim against CGT's property interests because the No-Lien Clause waives EPS's right to *maintain* and *enforce* a mechanic's lien against CGT's property interests." Mot. at 6 (emphasis added). By focusing on its hyper-technical and incorrect reading of the Subcontract, EPS leaves CGT's actual lien waiver argument entirely unaddressed and acts as if its discharge and release obligations are superfluous. But EPS may not "drain [its] agreement's text of all content save ink and paper" in order to escape its obligations. *Calvitti*, 351 Fed. Appx. at 655 (citation omitted).

Any right to file a mechanic's lien is meaningless if that right is coupled with a contractual obligation to release and discharge that very lien. This conclusion is strengthened by the fact that the Subcontract states that EPS shall be liable to CGT for "*any and all* Claims incurred by or suffered by" CGT or its property to the extent caused by EPS's non-compliance with "*any term or provision* of the Subcontract," which necessarily includes any failure to comply with the obligation to release and discharge EPS's lien. *See* Dkt.23-1, Subcontract at p. 17 (emphasis added).[2] Moreover, the fact the clause requires EPS to release and discharge any lien it files means that, at

[2] This specific liability clause was raised by CGT in its Motion. *See* Mot. at 4. EPS fails to address this clause in its Response, and has accordingly waived any argument related to it.

the very least, EPS must release and discharge the liens that are the subject of this lawsuit. As a matter of common sense, this means that EPS has waived its rights to enforce its liens in this litigation. The provision can have no other interpretation.

EPS similarly misses the mark in its attempts to distinguish CGT's case law, focusing its argument on distinctions without a difference. Its treatment of *Fuller*, for example, betrays its lack of understanding of mechanic's liens. *Fuller Co v. Brown Minneapolis Tank and Fabricating Co.*, 678 F. Supp. 506 (E.D. Pa. 1987). As EPS states, the *Fuller* court held that the relevant lien clause contained specific language that "meant that the subcontractor had to either post a bond or otherwise release its lien claim after filing it." Response at 11. From this holding, EPS concludes that "[t]he fact the subcontractor may later have to bond off the lien doesn't mean the subcontractor waived its rights to the mechanic's lien claim." *Id.* This conclusion is wrong.

The clause in *Fuller* stated in relevant part that "(BMT) [subcontractor] shall discharge at once or shall furnish to (Fuller) [owner] a bond satisfactory to (Fuller) against any mechanic's lien . . . which may be filed in connection with the work performed under this purchase order." 678 F. Supp. at 513. Based on this clause, and as EPS quotes, the *Fuller* court held that "it is perfectly clear that BMT covenanted that if and when it did file such a lien, Fuller could require one of two things from BMT: (1) the immediate removal of the lien or (2) the furnishing of a bond against the lien satisfactory to Fuller. . . ." *Id.* at 513; Response at 11. Moreover, this language was "clear and unambiguous." *Id.* As a result, the Court directed BMT, the subcontractor, to "either discharge the lien in question or furnish a bond satisfactory to Fuller against said lien." *Id.* And it reached this conclusion without even having to decide whether "BMT completely and fully waived its right to *assert* a mechanic's lien from the inception of its contractual relationship with Fuller." *Id.* (emphasis added).

Since the *Fuller* contract required BMT to either (a) discharge the lien in question or (b) furnish a bond against the lien, BMT effectively waived its right to enforce its lien against the owner's property. If BMT discharged its lien, it could not enforce it. And if BMT furnished a bond against the lien, BMT could not proceed against the owner's property interests either. Its lien enforcement action would have to proceed against the bond instead. *See generally, e.g., Cardinal Cost. Co. v. Besmic, Inc.*, 701 F. Supp. 1274, 1278 (S.D.W. Va. 1988) (dismissing suit for enforcement of mechanic's lien where valid bond existed, and holding plaintiff "shall realize only one recovery . . . as may be made on the bond."); W. Va. Code § 38-2-22 (properly recorded bond "and the surety thereon shall be responsible to lienor for payment of such lien account").

Moreover, since BMT would have to furnish the bond itself, BMT would end up financially liable for any judgment it secures. Realistically, BMT would not be able to secure a bond without either offering a guaranty, indemnity, or sufficient collateral to the surety in order to secure the bond. Put another way, furnishing a bond against a lien you file renders your lien meaningless, because you (1) can no longer proceed against the property, and (2) end up financially responsible for any judgment on the lien. Thus, the practical effect of bonding-off your lien is waiving it.

Perhaps more importantly, the No-Lien Clause in EPS's Subcontract does *not* give EPS any options other than discharging its liens. EPS must "cause any Lien which may be filed or recorded against the Work, the Facility, the Work Site or any lands or property of [CGT] to be released and discharged forthwith at the cost and expense of [EPS]"–end of story. This requirement is as unambiguous here as it is in *Fuller*. By *Fuller*'s own reasoning, EPS cannot proceed with litigation against CGT's property, and must instead release and "discharge the lien[s] in question." *Id.* at 514.

### C. The Subcontractors Liability and Indemnity Clause does not Affect the No-Lien Clause.

EPS argues that because "EPS does not have to indemnify Welded with respect to a lien claim where EPS has not been paid that money at issue . . . this means that EPS would have a right to make a lien claim for that amount." Response at 13. This leap in logic is indefensible. Indemnity is "[t]he right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty." INDEMNITY, Black's Law Dictionary (11th ed. 2019). The indemnification clause cited by EPS requires EPS to indemnify and hold harmless Welded and related parties whenever a lien is filed "on account of Work performed or materials supplied by" EPS to the extent EPS is fully paid. This necessarily includes indemnity for Welded against lien claimants who provided materials or work *through* EPS (for example, as sub-subcontractors or suppliers). In essence, the indemnity clause imposes extra financial obligations on EPS to the extent it has been fully paid. The fact that EPS has fewer *indemnity* obligations when it is not up-to-date on payments does not mean that EPS's other contractual obligations (e.g., to release and discharge liens at its own cost and expense) are contingent on payment.

Indeed, the payment condition in the Liability and Indemnity Clause shows that EPS and Welded knew how to make contractual obligations conditioned on payment where they wanted to. The fact that no such condition exists in the No-Lien Clause indicates that the parties chose not to make the obligations in the No-Lien Clause conditioned on payment to EPS. Nor would it make sense to do so: as discussed below, the No-Lien Clause expressly provides that "[n]o amounts are payable by [Welded] to [EPS] so long as a Lien remains registered against" CGT's property." Dkt. 23-1, Subcontract at pp. 15-16. It would be nonsensical to condition the consequence of non-payment in the No-Lien Clause on payment.

By its own terms, the Liability and Indemnity Clause does not change the operation of the

No-Lien Clause. Nor does it imply that EPS actually has a right to enforce a lien. The No-Lien Clause and the Liability and Indemnity Clause are completely independent. The plain terms of both clauses offer no contradictions, and EPS offers none. EPS's one-sentence argument to the contrary is both baseless and conclusory, and should be rejected.

### D. Welded's Right to Withhold Payment Under the No-Lien Clause renders EPS's Purported Liens Unenforceable.

Lacking an understanding of how its rights to payment are capped by its contract with Welded, EPS reverts to its near-sighted focus on whether the No-Lien Clause literally prevents EPS from "filing" a mechanic's lien. As discussed above, this is irrelevant. The parties to the Subcontract agreed upon abundantly clear language concerning the consequences of EPS's failure to release and discharge liens: "No amounts are payable by [Welded] to [EPS] so long as a Lien remains registered against the Work, the Facilities, the Work Site or any lands or property of Contractor, arising out of the Work." Dkt. 23-1, Subcontract at pp. 15-16. EPS even recognizes (but misstates) that the clause "states that Welded can withhold money from EPS if there is a lien registered," and "that is a defense of Welded's to its responsibility to pay EPS." Response at 14. However, according to EPS, CGT cannot use this clause as a defense because it "does not say that EPS cannot collect its money from the sale of the property." *Id.*

Here, EPS misses the forest for the trees. The purpose of the aforementioned covenant is to prevent EPS from burdening CGT's property interests. In conjunction with the remainder of the No-Lien Clause, this covenant operates to (1) incentivize EPS to release any lien it files, and (2) discourage EPS from filing a lien in the first instance. If EPS decides to burden CGT's property, as it has done here, the clause erases any of Welded's *payment obligations* to EPS (rendering nothing due and owing)—and in EPS's own words—acts as "a defense of Welded's to its responsibility to pay EPS." *Id.*

EPS fails to understand that if Welded has no obligation to pay EPS, then CGT's real property interests cannot be bound by a lien claim from EPS. Nothing is "payable." This is because EPS can only have a lien claim for amounts that are due and owing from Welded. Under West Virginia law, a subcontractor's lien claim is based on its "contract with [the] general contractor . . . for an agreed contract price or by day or by piece, or other basis of payment." W. Va. Code §38-2-2. The second it filed its lien claim, the amounts Welded contractually owed EPS, if any, became $0. If Welded owes EPS $0, then EPS's lien claim against CGT's property interests cannot be anything more than $0: a subcontractor's right to a lien only allows it to "subject" real property "to the satisfaction of [its] claim as [it] has against the principal contractor." *Kane & Keyser Hardware Co. v. Cobb*, 79 W. Va. 587 (*Syllabus*) (1917). That the Lien Clause does not explicitly state that EPS "cannot collect its money from the sale of the property" is irrelevant, because the Lien Clause operates to reduce the value of any filed lien to $0. Response at 14. Read as a whole, the No-Lien Clause was crafted to ensure that no lien claims can be enforced against CGT's property interests. In the face of the clause, EPS should not be entitled to proceed.

**E. <u>The Public Policy of West Virginia Supports Blanket Lien Waivers.</u>**

EPS argues that "there is also an overwhelming public policy against the use and enforcement of such blanket lien waiver clauses," and that "most states now disfavor blanket waiver clauses and are legislating them to be void and unenforceable because they too easily defeat a significant and important statutory right of contractors." Response at 12. In so arguing, EPS fails to cite a single statute or case expressing any West Virginia public policy against blanket lien waivers. It cannot, because no such authority exists.

As EPS is well aware, states have the ability to legislate prohibitions against blanket lien waivers. *The West Virginia Legislature has not chosen to do so.* To the extent EPS is asking this Court to override the plain language of the No-Lien Clause out of public policy concerns, it is

improperly asking this Court to legislate from the bench on matters of West Virginia law that the West Virginia Legislature has chosen to remain silent on.

To the contrary, West Virginia public policy strongly supports enforcing subcontractors' contractual waivers of rights to payment. In *Wellington Power,* a case cited by EPS, the subcontractor challenged the pay-if-paid clause in its contract with the general contractor by arguing that the clause violated West Virginia's public policy. *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33 (W. Va. 2005). The Supreme Court of West Virginia disagreed, holding that "the freedom to contract is a substantial public policy that should not be lightly dismissed," and that West Virginia's "public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public." *Id.* at 38.

Here, EPS fails to identify any West Virginia public policy concerns, let alone any that are of "greater importance to the general public" than freedom of contract. Since EPS voluntarily agreed to the No-Lien Clause, the Court should enforce its unambiguous terms.

## II. EPS's Quasi-Contractual Claims must be Dismissed because they are not Supported by Independent Facts.

With respect to EPS's unjust enrichment and quantum meruit claims, the only issue disputed by CGT's Motion is whether EPS pleaded independent facts to support quasi-contractual recovery. EPS did not.

EPS seems to acknowledge that its quantum meruit and unjust enrichment claims cannot succeed in the face of an express contract. Nevertheless, it argues that at the pleading stage, it can assert contractual and quasi-contractual claims in the alternative. EPS ignores that its alternative claims for relief can be brought "only when independently supported by facts." *Schmid Pipeline Constr. Inc. v. Columbia Gas Transmission, LLC*, Adv. Pro No. 19-50886-CSS, Mem. Order at p.

6 (Bankr. D. Del. Dec. 20, 2019) (Hon. Gross, U.S.B.J.); *see also Ohio Valley Health Servs. & Educ. Corp. v. Riley,* 149 F. Supp. 3d 709 (N.D.W. Va. 2015); *Worldwide Mach. L.P. v. Columbia Gas Transmission, LLC*, No. 5:19-CV-208, 2019 WL 3558174 (N.D.W. Va. Aug. 5, 2019). Here, EPS has pleaded the existence of its Subcontract in both its quantum meruit and unjust enrichment causes of action. It has accordingly pleaded itself out of viable quasi-contractual claims.

EPS utterly fails to distinguish the decision in *Schmid* from this case, and completely ignores Judge Gross's opinion in that matter.[3] EPS also fails to address *Worldwide Mach.* and *Ohio Valley. Schmid*, *Worldwide Mach.*, and *Ohio Valley* apply squarely to this case. Schmid Pipeline and Worldwide Machinery even (1) liened the same property as EPS, and (2) based their claims on similar subcontracts with Welded. Both claimants had their quasi-contractual claims dismissed by U.S.D.J. Johnson in the Northern District of West Virginia (and the *Schmid* dismissal was upheld on a denial of reconsideration by Judge Gross).[4]

Like the claimants in *Schmid, Worldwide Mach*, and *Ohio Valley*, EPS claims it is entitled to plead claims in the alternative at the motion to dismiss stage because alternate pleading is permissible when there is a disagreement over the parties' respective contractual liabilities. But the mere disagreement over contractual liabilities does not mean that the parties dispute whether EPS's work was performed pursuant to its Subcontract. *Schmid,* Mem. Order at p. 5. To the extent EPS is arguing that CGT disputes whether EPS's work was performed pursuant to the Subcontract, that is not the case. CGT pleaded the opposite, claiming that "EPS performed certain work and

[3] Instead of addressing Judge Gross's opinion, EPS focuses on a preceding opinion by U.S.D.J. Bailey in the Northern District of West Virginia.

[4] Judge Bailey never addressed this line of argument in *HERC*. *See HERC Servs., LLC v. Columbia Gas Transmission, LLC,* No. 5:19CV000174, Order Dismissing Compl. (N.D. W. Va. June 24, 2019). CGT never cited *HERC* for the authority that EPS claims it did.

furnished some . . . materials for the construction of MXP pursuant to two subcontracts with CGT's general contractor for Spread 1 of MXP." Dkt. No. 10, CGT's First Am. Answer and Countercl. at Countercl. ¶4.[5] Based on the pleadings by both parties to this dispute, this Court will never have the opportunity to conclude that there was no contract for the work performed by EPS.

While EPS cites numerous cases in an attempt to argue that under West Virginia law, a subcontractor may plead quantum meruit or unjust enrichment when parties dispute the terms of a contract, its cases do not support that conclusion. In *Stand Energy*, for example, the Court did not dismiss quasi-contractual claims because it "ha[d] not determined whether the contracts identified by Plaintiffs applied to the course of dealing alleged." *Stand Energy Corp. v. Columbia Gas Transmission Corp*, 373 F. Supp. 2d 631, 644 (S.D.W. Va. 2005), on reconsideration in part, 521 F. Supp. 2d 537 (S.D.W. Va. 2007), and on reconsideration in part, CV 2:04-0867, 2008 WL 11430036 (S.D.W. Va. Jan. 4, 2008). Similarly, the *KAR Contracting* and *Master Masonry* courts held that a plaintiff could seek quasi-contractual recovery if there is no express contract governing extra services and materials it provided. *U.S. ex rel. Asphalt Contractors & Site Work, Inc. v. KAR Contracting, LLC*, No. 14-27451, 2015 WL 3651279, at *4 (S.D.W. Va. June 11, 2015); *U.S. ex rel. Master Masonry, LLC v. Travelers Casualty and Surety Co.*, No. 16-50, 2016 WL 7156587, at *2 (N.D.W. Va. 2016). Here, there is no dispute over whether EPS provided extra-contractual services. CGT and EPS agree that all of EPS's work was performed pursuant to a contract.

[5] The paragraph cited by EPS in support of its argument regarding extra-contractual work relates to the validity of a change order: "For example, the lien contains roughly $2 million of charges tied to a change order EPS submitted to Welded for consideration well after it was terminated for cause. The change order included additional amounts which EPS contends it should be paid instead of contract amounts, due to working on the steep slopes of MXP Spread 1." Dkt. No. 10, CGT's First Am. Answer and Counterlc. at Countercl. ¶27. Just because the parties dispute whether EPS is entitled to a change order for additional compensation does not mean that the parties dispute whether EPS performed its work pursuant to a contract (i.e., the Subcontract).

Accordingly, neither *Stand*, *KAR Contracting,* nor *Master Masonry* provide EPS support.

The only case that possibly supports EPS's position is *Span Construction*, which EPS quotes for the proposition that "Under federal law, a plaintiff is permitted to plead unjust enrichment as an alternative to contract recovery when the terms of a contract or the parties to said contract are disputed." *Span Constr. & Eng'g, Inc. v. Uwharrie Builders, LLC*, No. 18-178, 2019 WL 1574233 at *2 (N.D.W. Va. Jan. 30, 2019). By its own terms, *Span Construction* states a proposition of "federal law," which should have no bearing on this argument. West Virginia—not federal—law governs whether the quasi-contractual claims can stand in the face of an express contract. *See, e.g., Ohio Valley*, 149 F. Supp. 3d at 722 ("*West Virginia law* has made it explicitly clear that '[a]n express contract and an implied contract, relating to the same subject matter, cannot co-exist.'" (citations omitted) (emphasis added). Curiously, *Span Construction* cites to no West Virginia authority supporting its statement of "federal law." By contrast, *Schmid* and the other Northern District of West Virginia opinions cited in CGT's Motion rely almost exclusively on West Virginia authorities in dismissing quasi-contractual claims. At most, EPS has singled out one opinion from the Northern District of West Virginia that contradicts both earlier and later authority from the same District. *See Ohio Valley Health Servs & Educ. Corp. v. Riley*, 149 F. Supp. 3d 709 (N.D.W. Va. 2015); *Worldwide Mach.*, 2019 WL 3558174 (Aug. 5, 2019) *Schmid Pipeline Constr., Inc. v. Columbia Gas Transmission, LLC*, No. 5:19-CV-208, 2019 WL 3558174 (N.D. W. Va. Aug. 5, 2019). In light of the weight of authority that contradicts it, *Span Construction* is an anomaly that this Court should ignore.[6]

[6] However, in the event that this Court finds that this issue is a matter of federal law, this Court should follow *Schmid* as the more persuasive authority. Not only does *Schmid* come from the same district, but it was authored by Judge Gross, who previously presided over the Welded bankruptcy case and this very litigation.

Since EPS alleges its Subcontract as part of its quasicontractual causes of action, *see* EPS's Am. Compl. at ¶¶8,9,11,12,16,18,36,51, its claims for "unjust enrichment and quantum meruit are not independently supported by the facts," and must be dismissed. *Schmid*, Mem. Order at p. 5; *see also Ohio Valley*, 149 F. Supp. 3d at 721; *Worldwide Mach.*, 2019 WL 3558174, at *2.

## III. The Court should not Grant EPS Leave to Amend.

The Court should not grant EPS leave to amend its pleadings. This case has been pending since March 2019 and EPS has already amended its complaint twice. There is no reason to believe that EPS could somehow make its claims against CGT viable in a fourth iteration. "Three attempts at a proper pleading is enough . . . a plaintiff has to carefully consider the allegations to be placed in the complaint before it is filed." *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 74 (3d Cir. 1994). Moreover, there are no facts that EPS could reasonably plead to either escape from the No-Lien Clause or the fact that it performed its work under the Subcontract—"if [EPS] could plead such facts, [it] would have already done so." *U.S. ex rel. Schumann v. AstraZeneca Pharm. L.P.*, 769 F.3d 837, 849 (3d Cir. 2014) (citations omitted). Accordingly, amendment is futile, and the opportunity to amend should be denied. *See id.*

## CONCLUSION

The Subcontract was drafted to ensure that CGT and its property interests would never be held hostage to a dispute between EPS and Welded. Instead of heeding the Subcontract, EPS has forced CGT to expend considerable resources to defend against meritless claims. The Court should end EPS's charade. For the reasons set forth above and in CGT's Motion, CGT respectfully asks the Court to dismiss EPS's claims with prejudice and grant CGT all other relief to which it is justly entitled.

Date: July 13, 2020

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**IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE**

| | |
|---|---|
| In re:<br><br>WELDED CONSTRUCTION, L.P., et al.,<br><br>Debtors. | Chapter 11<br><br>Case No. 18-12378 (CSS)<br><br>(Jointly Administered) |
| EARTH PIPELINE SERVICES, INC.,<br><br>Plaintiff,<br>v.<br><br>COLUMBIA GAS TRANSMISSION, LLC, WELDED CONSTRUCTION, L.P.,<br><br>Defendants. | Adv. Pro. No. 19-50274 (CSS)<br>Adv. Pro. No. 19-50275 (CSS)<br><br>(Consolidated) |
| WELDED CONSTRUCTION, L.P.,<br><br>Plaintiff,<br>v.<br><br>EARTH PIPELINE SERVICES, INC.<br><br>Defendants. | Adv. Proc. No. 20-50612 (CSS)<br><br>(Consolidated) |

**CERTIFICATE OF SERVICE**

I, David W. Carickhoff, hereby certify that on July 13, 2020, I caused true and correct copies of the *Columbia Gas Transmission, LLC's Reply in Support of its Motion to Dismiss* to be served on all parties named in the attached service list in the manner indicated.

Date: July 13, 2020

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